



Legislative Bulletin.....June 22, 2005

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H.J.Res. 10—Proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States

Summary of the Bill Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: \$0

Effect on Revenue: \$0

Total Change in Mandatory Spending: \$0

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: 0

Number of Bills Without Committee Reports: 0

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

H.J.Res. 10—Proposing an amendment to the Constitution of the United States authorizing the Congress to prohibit the physical desecration of the flag of the United States (Cunningham)

Order of Business: The constitutional amendment is scheduled to be considered on Wednesday, June 22nd, under a structured rule (H.Res. 330) making in order one amendment in the nature of a substitute to be offered by Rep. Watt or his designee.

Summary: H.J.Res. 10 would propose an amendment to the U.S. Constitution to allow Congress to enact legislation that would prohibit the physical desecration of the American flag. H.J.Res. 10 would have to pass both the House and the Senate by a two-thirds margin.

The legislatures (or conventions) of three-fourths of the States would have to ratify the proposed amendment within seven years for the amendment to become effective.

NOTE: Ratification of this constitutional amendment would NOT prohibit flag desecration. It would only give Congress the legislative authority to prohibit flag desecration, should it so desire. Actual prohibition of flag desecration would therefore have to be passed subsequently under regular legislative order.

The text of H.J.Res. 10 is as follows:

SECTION 1. CONSTITUTIONAL AMENDMENT.

The following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

‘Article--

‘The Congress shall have power to prohibit the physical desecration of the flag of the United States.’

Recent Vote History:

The flag-desecration constitutional amendment passed the House on:

- June 28, 1995, by a vote of 312-210:
<http://clerkhouse.house.gov/votes/votes2.asp?year=1995&roll=431>
- June 12, 1997, by a vote of 310-114:
<http://clerkhouse.house.gov/votes/votes2.asp?year=1997&roll=202>
- June 24, 1999, by a vote of 305-124:
<http://clerkhouse.house.gov/votes/votes2.asp?year=1999&roll=252>
- July 17, 2001, by a vote of 298-125:
<http://clerkhouse.house.gov/votes/votes2.asp?year=2001&roll=232>
- June 3, 2003, by a vote of 300-125:
<http://clerkhouse.house.gov/votes/votes2.asp?year=2003&roll=234>

In recent years, the Senate has either not considered a flag-desecration amendment or one has failed to get the required two-thirds vote on the Senate floor.

Additional Background: In 1984, a Texas man was arrested for burning a stolen American flag outside the Republican National Convention in Dallas. He was convicted of violating a Texas law against flag desecration. His conviction was appealed to the Supreme Court, and in 1989 the Court in a 5-4 decision (*Texas v. Johnson*) struck down 48 state laws that made criminal the public burning of the flag.

In September 1989, in response to the Supreme Court decision, Congress passed the Flag Protection Act of 1989 by a vote of a 380 to 38. In June of 1990, in another 5-4 decision (*U.S. v. Eichman*) the Supreme Court struck down this new law stating that burning an American flag as part of a political demonstration was expressive conduct protected by the First Amendment to the U.S. Constitution, and neither the states, nor the federal government could prohibit the desecration of the American flag. The Supreme Court said in the *Eichman* opinion that the only way the flag could be protected would be by the creation of a narrow “juridical category,” wherein the flag was specifically recognized above all other symbols and, therefore, could be accorded special protection.

Since 1989, there have been over 100 reports of incidents involving flag desecration nationwide. To see a list of such incidents, visit this website:

<http://www.cfa-inc.org/issues/burnings.htm>

According to the Citizens Flag Alliance, since the 1990 Supreme Court ruling, 49 states have passed resolutions calling on Congress to pass the amendment and send it back to the states for ratification. (Vermont is the only state not to pass such a resolution.)

On June 14, 1777 (twelve years before the ratification of the U.S. Constitution), the Continental Congress resolved: “That the flag of the United States be thirteen stripes, alternate red and white; that the union be thirteen stars, white in a blue field, representing a new constellation.”

Amendment Made in Order under the Rule (H.Res. 330):

It is expected that Rep. Watt (D-NC) will offer an amendment that states that: “Not inconsistent with the first article of amendment to this Constitution, the Congress shall have the power to prohibit the physical desecration of the flag of the United States.” [*emphasis added*]

Committee Action: The constitutional amendment was introduced on January 25, 2005, and referred to the Judiciary Committee. On May 25th, the Committee marked up the amendment and reported it favorably by a vote of 17-9.

Administration Position: Although no Statement of Administration Policy (SAP) is available for H.J.Res. 10, for the identical constitutional amendment two years ago, the Bush Administration submitted the following SAP to Congress:

“The Administration supports H.J.Res. 4, which would propose to amend the United States Constitution to authorize the Congress to prohibit the physical desecration of the flag of the United States.”

<http://www.whitehouse.gov/omb/legislative/sap/108-1/hjr4sap-h.pdf>

Cost to Taxpayers: CBO reports that H.J.Res. 10 itself would have no impact on the federal budget. If the proposed constitutional amendment were approved by the states, then any future legislation prohibiting flag desecration could impose additional costs on U.S. law enforcement agencies and the court system, to the extent that cases involving desecration of the flag are pursued and prosecuted. However, CBO does not expect any resulting costs to be significant.

Does the Bill Expand the Size and Scope of the Federal Government?: The joint resolution proposes an amendment to the United States Constitution that would give Congress a new power. Twenty-seven constitutional amendments have been ratified since the Founding. The most recent ratification was in 1992 (regarding congressional pay raises).

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates?: No.

Constitutional Authority: The Judiciary Committee, in House Report 109-131, cites constitutional authority for the amendment under Article V, which grants Congress the authority to propose amendments to the Constitution.

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